

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C.

In the matter of

Implementation of the Satellite Home
Viewer Improvement Act of 1999

Application of Network Nonduplication
Syndicated Exclusivity, and Sports Blackout
Rules to Satellite Transmissions

CS Docket No. 00-2

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**COMMENTS OF
THE ASSOCIATION OF LOCAL TELEVISION STATIONS, INC.**

The Association of Local Television Stations, Inc. ("ALTV"), submits these comments in response to the Commission's *Notice of Proposed Rulemaking* in the above captioned proceeding.¹ ALTV has a vital interest in this proceeding. ALTV represents the interests of local television stations not affiliated with the three long-entrenched broadcast television networks -- ABC, CBS, and NBC. This includes many stations affiliated with the emergent UPN and WB networks (including the six remaining "nationally distributed superstations"). These types of local television stations are most directly affected by the new requirement that satellite carriers provide network nonduplication and syndicated exclusivity protection. Indeed, ALTV was instrumental in urging inclusion of the statutory provisions which the Commission is undertaking to implement herein in the Satellite Home Viewer Improvement Act of 1999 ("SHVIA").

¹FCC 00-4 (released January 7, 2000)[hereinafter cited as *Notice*].

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1. The Commission Correctly Understands the Statutory Mandate to Apply the Current Cable Television Nonduplication, Syndicated Exclusivity, and Sports Blackout Rules to Satellite Retransmission of Nationally Distributed Superstations.

ALTV submits with some delight that the Commission has construed the statute and its obligations thereunder accurately in nearly every material respect. The Commission rightly states that “Section 339(b) directs the Commission to apply these three rules (*i.e.*, network nonduplication, syndicated exclusivity, and sports blackout), previously applicable only to cable television systems, to satellite carriers retransmission of nationally distributed superstations to subscribers.”² With an equally sound appreciation of the statute, the Commission states:

The SHVIA’s directive to apply the network nonduplication, syndicated exclusivity, and sports blackout rules to satellite transmission of nationally distributed superstations appears to apply without any limitation based upon a satellite carrier’s technical ability to comply.³

Thus, the Commission lacks the discretion to weaken or modify the rules in any material respect. Any doubt about this position would clash not only with the express language of the statute, but also with several salient features of the history of the provision.⁴ Congress made a conscious decision not to qualify Section 339(b)(1)(A) with any provision permitting consideration of technical feasibility. First, Section 339(b)(1)(A) stands in marked contrast to Section 339(b)(1)(B), which expressly allows the Commission to consider the extent to which the sports blackout rule applicable to network stations (other than nationally distributed superstations) might be technically unfeasible or economically prohibitive.⁵ No such language or limitation appears in Section

²*Notice* at ¶2.

³*Notice* at 27.

⁴Notably, Section 339(b)(1)(A) makes specific references to the cable television network nonduplication, syndicated exclusivity, and sports blackout rules. 47 U.S.C. 339(b)(1)(A).

⁵47 U.S.C. §339(b)(1)(B).

339(b)(1)(A). Congress easily might have included similarly limiting language in the preceding subparagraph(B), but it did not. Second, earlier versions of the SHVIA legislation included language directing the Commission to consider technical, economic, and other factors in establishing network nonduplication, syndicated exclusivity, and sports blackout rules applicable to satellite carriers. For example, Section 10 (a)(1) of H.R. 1027, reported by the House Committee on the Judiciary on April 12, 1999, directed the Commission to adopt network nonduplication, syndicated exclusivity, and sports blackout rules providing the same level of protection as those applicable to cable television, but only “[t]o the extent possible, and where technologically feasible and economically reasonable.”⁶ Similarly, Section 103 of H.R. 851, reported by the House Committee on Commerce on March 25, 1999, amended Section 712 of the Communications Act and directed the Commission to adopt network nonduplication, syndicated exclusivity, and sports blackout rules providing the same degree of protection as those applicable to cable television, but only “[t]o the extent possible.”⁷ This limiting phrase remained in the legislation when it passed the House as H.R. 1554. However, the legislation ultimately agreed to by the committee of conference included no such provision or limitation. Again, Congress easily might have granted the Commission authority to consider issues of technical feasibility and economic impact, but ultimately, it determined to take that issue off the table at the Commission. Lastly in this regard, the approach taken by Congress in the 1999 SHVIA rejects the approach to the issue taken in the 1988 SHVA. Therein, Congress directed the Commission to apply syndicated exclusivity rules to satellite carriers (then C-band), but only if the Commission found

⁶See H. Rep. No. 106-86, Part 1, 106th Cong., 1st Sess. (1999).

⁷See H. Rep. No. 106-79, 106th Cong., 1st Sess. (1999).

them feasible.⁸ Congress might have taken the same approach in 1999, but, again, it did not. Therefore, the Commission is quite correct in asserting that Congress directed the Commission to adopt network nonduplication, syndicated exclusivity, and sports blackout rules applicable to nationally distributed superstations “without any limitation based upon a satellite carrier’s technical ability to comply.”⁹ Therefore, the Commission has set out on a correct course; it has read Section 339(b)(1)(A) faithfully, stating that it “requires application of three cable rules, network nonduplication, syndicated exclusivity, and sports blackout, to satellite retransmission of nationally distributed superstations.”¹⁰

The Commission also rightly observes that Congress was “seeking to create parity between the regulations covering satellite carriers and cable operators.”¹¹ Even in the case of Section 339(b)(1)(B), which requires application of the sports blackout rules to satellite retransmission of network stations “to the extent technically feasible and not economically prohibitive,” Congress emphasized that, “Without that showing, the rules should be as similar as possible to that applicable to cable services.”¹² This rendition of the parity theme resonates with other provisions of the new law. For example, the conference committee stated that, “[I]t is important that the satellite industry be afforded a statutory scheme for licensing television broadcast programming

⁸Pub. L. No. 100-667, Title II, 102 Stat. 3949-3960 (1988), 17 U.S.C. §119; *see also Report and Order*, GEN. Dkt. No. 89-89, FCC 90-431 (released February 8, 1991). Notably, however, the Commission refrained from adopting so-called “satellite syndex” rules primarily because “only 60% of authorized decoders [set top boxes] would have [exclusivity protection] capability when the compulsory license expires at the end of 1994.” At that time, the Commission assumed that Congress did not intend to extend the compulsory license. *Id.* at ¶¶15-16.

⁹*Notice* at ¶27.

¹⁰*Notice* at ¶4.

¹¹*Notice* at ¶9.

¹²Joint Explanatory Statement of the Committee of Conference at 11.

similar to that of the cable industry.”¹³ Similarly, the new statutory copyright license enacted in SHVIA, according to the conference committee, creates “parity and enhanced competition between the satellite and cable industries in the provision of local television broadcast stations.”¹⁴ This consistent theme of regulatory parity confirms Congress’s intent to establish substantial regulatory parity between cable and satellite.

The Commission also correctly understands Congress’s rationale for applying the rules only to the signals of nationally distributed superstations:

We believe that Congress’ purpose in applying the network nonduplication, syndicated exclusivity, and sports blackout rules to these satellite retransmissions reflects a balance between providing access to national programming carried by a superstation and a recognition that, in the absence of retransmission consent requirements, broadcasters and rights holders will have no opportunity to protect their contractual rights.¹⁵

Unlike other network affiliates, the remaining few nationally distributed superstations may continue to be retransmitted to satellite subscribers in served as well as unserved households.¹⁶ They are not limited to unserved households under Section 119 of the Copyright Act (the distant signal compulsory license) and their signals may be retransmitted to satellite subscribers without the consent of the originating station.¹⁷ The only means available to local television stations to protect their exclusive rights to network and syndicated programming *vis-a-vis* the signals of the nationally distributed superstations are the network nonduplication and syndicated exclusivity rules contemplated by Section 339(b)(1)(A).

¹³Joint Explanatory Statement of the Committee of Conference at 2.

¹⁴Joint Explanatory Statement of the Committee of Conference at 3.

¹⁵*Notice* at ¶9.

¹⁶*See Notice* at ¶8.

¹⁷*Notice* at ¶8.

The Commission also has identified correctly the stations which fall within the definition of a nationally distributed superstation. Six “longstanding superstations” are subject to the copyright license “unserved household” and retransmission consent exemptions. These stations are WGN-TV, WPIX-TV, KWGN-TV, KTLA-TV, WWOR-TV, and WSBK-TV.¹⁸ As the Commission rightly observes, the list is finite; no other station can meet these criteria in the future.¹⁹ The Commission also states accurately the status of the UPN and WB networks as networks under the applicable definition, as well as the network affiliation of the stations.²⁰ However, ALTV does point out that WGN-TV, Chicago, remains affiliated with the WB network. The signal of WGN-TV that is retransmitted by cable systems and satellite carriers is not the local, off-air signal. A so-called “syndex proof” signal of WGN-TV has been made available for uplink by WGN-TV to facilitate carriage of WGN-TV without need for program deletions and substitutions by individual cable systems or satellite carriers. In the fall of last year, this “syndex proof” WGN-TV signal was further modified to delete WB network programming when the network for the first time granted its affiliates nonduplication protection against the WGN-TV signal. Substitute programming is used to cover the gaps from network and syndicated program deletions. Thus, the uplinked WGN-TV signal now is both “syndex proof” and “nondupe proof.” Otherwise, the Commission has embraced the new statute, the underlying Congressional intent, and the contemplated effect accurately and remained faithful to the mandate of the statute in proposing to apply the current cable

¹⁸*Notice* at ¶8.

¹⁹*Id.* If any of these stations becomes an affiliate of ABC, CBS, Fox, or NBC, satellite carriers no longer could retransmit their signals in unserved households pursuant to the statutory license in Section 119, 17 U.S.C. §§119(a)(2) and 119(a)(5)(E)(iii).

²⁰*Notice* at 6, n.11. The satellite retransmission of other UPN and WB affiliates, as well as PaxTV affiliates, is limited to unserved households. Each of these emerging networks now qualifies as a network under the applicable definition in Section 119(d). *N.B.* This definition was changed in the 1994 SHVA, subsequent to the Commission’s adoption of rules implementing Section 325 (which refers to the definitions in Section 119(d)). *See* 17 U.S.C. §119(d)(2)(A).

television network nonduplication, syndicated exclusivity, and sports blackout rules, to satellite retransmission of nationally distributed superstations.

2. The Cable Television Rules Will Readily Adapt to Satellite Carriers.

Although the Commission properly has proposed to apply its cable television network nonduplication, syndicated exclusivity, and sports blackout rules to satellite retransmission of nationally distributed superstations, ALTV does wish to address several questions raised by the Commission with respect to the particular application of the rules to satellite systems. None of these matters materially changes the level of protection afforded by the rules. They merely adapt the rule to satellite carriers in a sound and judicious manner.

Separate Rules. ALTV recommends that the Commission adopt separate rules, reflecting the cable television rules, for satellite carriers.²¹ This will enable the Commission to maintain the substantive consistency of the rules, while adopting such minor adjustments as may be necessary to apply the rules properly to satellite carriers. ALTV emphasizes that this approach contemplates no reduction in the level of protection provided, but would accommodate changes demanded by the statute, such as the application of the rules only to nationally distributed superstations, as well as minor modifications required to adapt the cable regulatory scheme to satellite carriers.

Zone of Protection. ALTV submits that the Commission is correct in proposing to provide local television stations with the same zones of protection provided under the cable television network nonduplication, syndicated exclusivity, and sports blackout rules.²² The 35-mile and 55-mile zones of protection are definite; they suffer none of the difficulties associated with ascertaining whether a subscriber receives a signal of grade B intensity. Furthermore, geocoding techniques already used to determine whether a household is served or unserved easily may be

²¹Rules applicable to DBS providers, for example, would be established in Part 100 of the Commission's rules.

²²*Notice* at ¶¶14-15, 20-21, 24.

applied to determine whether a household is located within a local television station's specified zone. Therefore, the Commission ought command use of the most precise approach possible in establishing the location of households.²³

Contractual Language. Inasmuch as the Commission has required that contracts state that "the licensee shall, by the terms of this contract, be entitled to invoke protection against the duplication of programming imported under the Compulsory Copyright License, as provided in the FCC's syndicated exclusivity rules," no additional provision is necessary to pre-ordain some equally "magic" words with respect to the satellite rules. The language currently required already invokes the two essential elements for protection -- retransmission pursuant to the statutory license and reference to the Commission's rules. Thus, any local television station with exclusivity or nonduplication rights *vis-a-vis* cable should be considered to hold the same rights with respect to satellite carriers.

Notice. ALTV submits that the Commission ought apply the same notification provisions to the satellite rules as provided in the cable television network nonduplication, syndicated exclusivity, and sports blackout rules. ALTV also urges the Commission to require the two satellite carriers -- DirecTV and EchoStar -- to designate by name, title, and address the person to whom notices should be sent.²⁴ The notice should be sent annually and updated as necessary to reflect

²³Less than absolute precision in application of the rules hardly need cause the Commission's screen to freeze. Many cable system community units straddle the specified zone circumferences. In such cases, all subscribers to the system serving that community unit are subject to program deletions, even if they reside a few blocks or a few miles outside the specified zone. The same scenario arises with use of Zip Codes. The specified zone circumference would transect the Zip Code area. Taking the same approach as the Commission has taken with cable system community units, some subscribers slightly beyond the boundary of the specified zone might be affected. Some precision may be lost to certainty and ease of application, but the result would be no less inimical to the public interest than the cable community unit approach. Such an approach also would be consistent with the statutory call for regulatory parity.

²⁴To avoid considerable potential for confusion, the Commission should not permit the two satellite carriers or future direct competitors to designate multiple reseller entities to receive notification under the rules.

any change in the identity of the designated person. This parallels ALTV's previous request that satellite carriers designate a contact person for retransmission consent/carry one, carry all elections. Much is to be said for avoiding delay and miscommunication in providing such notices to satellite carriers. Moreover, such a requirement imposes no meaningful burden on a satellite carrier.

Substitute Programming. ALTV only wishes to point out that the statutory provisions which would apply to a satellite carrier's use of substitute programming differ from those applicable to cable systems, both today, and when the substitution provisions were adopted. First, unlike the cable compulsory license, neither sections 122 nor 119 of the Copyright Act, the local and distant signal satellite statutory (*nee*' compulsory) licenses includes a provision addressing substitute programming. Second, unlike the cable compulsory license, the satellite statutory licenses impose limits of various sorts on the retransmission of signals under the license.²⁵ Network station signals are limited to two per network per day and restricted to unserved households.²⁶ Local signals may be provided only in the market of the local television station.²⁷ Third, any retransmission of the signal of a broadcast television station by a satellite carrier must comply with the retransmission consent requirement.²⁸ The Commission has no authority to nullify the requirements and limitations in either the Copyright Act or the Communications Act.²⁹

²⁵The cable compulsory license was essentially unlimited in scope, subject to whatever limitations or requirements the Commission applied to cable carriage of broadcast signals. *See Cable Television Report and Order*, 36 FCC 2d 141 (1972).

²⁶17 U.S.C. §119(a)(2)(B)(ii). A similar limitation on the number of signals appears in the Communications Act, 47 U.S.C. §339(a)(1)(A).

²⁷17 U.S.C. §122(a).

²⁸47 U.S.C. §325(b).

²⁹None of these limitations bar substitute programming cleared through normal marketplace program licensing.

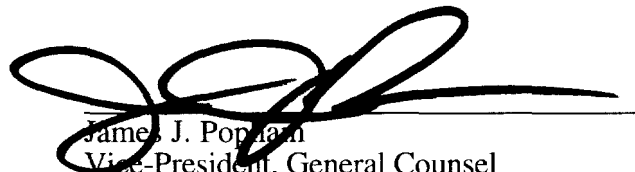
Therefore, any substitute programming permitted by the Commission must consist of nonbroadcast programming or comply with the statutory provisions governing use of broadcast station signals.

Digital Transmissions. No basis exists for excluding digital signals from the rules. In the context of distant signals, Congress stated no intent to exclude digital signals in any way. Moreover, it directed the Commission to recommend standards for subscriber eligibility with respect to digital as well as analog signals. Ultimately, if program distributors wish to facilitate retransmission of their programs in digital formats on nationally distributed superstation digital signals outside their local markets, they remain free to negotiate more limited exclusivity protection with local television stations. Therefore, the Commission should make no distinction between the analog and digital signals of nationally distributed superstations under the rules.³⁰

3. Conclusion

In view of the above, ALTV urges the Commission to embrace its current proposals to apply the cable television nonduplication, syndicated exclusivity, and sports blackout rules to satellite retransmission of nationally distributed superstations. This is exactly what Congress intended and what the statute requires. Only the most minor adjustments are necessary to adapt the cable rules to satellite carriers. Even these ought be undertaken judiciously with a keen eye on the consistency and parity contemplated and mandated by the statute.

Respectfully submitted,



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³⁰Whereas this may appear premature, ALTV has urged the Commission to establish regulations like this and digital must carry as quickly as possible. Otherwise, continuing uncertainty is likely to impede DTV development and the rapid transition contemplated by Congress and the Commission.